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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 145

ROXANNE TANNEHILL

versus

THOMAS W. ROBERTS, ET AL

BRIEF IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

BRIEF SUBMITTED ON BEHALF OF TRINITY UNIVERSAL INSURANCE COMPANY, Respondent

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BRIEF SUBMITTED ON BEHALF OF
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Respondent

OPINION BELOW

The opinion of the Louisiana Court of Appeals for the Fourth Circuit is reported in the transcript of the record and at 216 So. 2d 656 (La. App. 1968).

QUESTIONS PRESENTED

Whether the claimed Federal questions were timely raised in the State Courts below; and

(2) Whether the record indicates that the Louisiana Court of Appeals for the Fourth Circuit reversed finding of fact; and

(3) Whether the decision of the Louisiana Appellate Court reversing a jury verdict deprived petitioner of some right protected by the Federal Constitution, particularly Amendment XIV thereto; and

(4) Whether Article 7, Paragraph 29, Constitution of Louisiana, which sanctions appellate review of facts in civil cases is repugnant to the Federal Constitution, particularly Article XIV thereto; and

(5) Whether, where the litigant pays prescribed Court fees, he thereby purchases a verdict or judgment which may not be reviewed on appeal.

CONSTITUTIONS OR STATUTES INVOLVED

Amendment VII to the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules at common law."

Amendment XIV to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law,* nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution, State of Louisiana, Article 7, Section 27:

All cases on appeal to the Courts of Appeal shall be tried on the original record, pleadings, and evidence.

The rules of practice regulating appeals to and proceedings in the Supreme Court shall apply to appeals and proceedings in the Courts of Appeal, so far as they may be applicable, until otherwise provided.

Constitution, State of Louisiana, Article 7, Section 29:

"The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, of which the Civil District Court for the Parish of Orleans, or the District Courts throughout the State, have exclusive original jurisdiction, regardless of the amount involved, or concurrent jurisdiction exceeding one hundred dollars, exclusive of interest, and of which the Supreme Court is not given jurisdiction, except as otherwise provided in this Constitution, *and all appeals shall be both upon the law and the facts.*"

STATEMENT OF THE CASE

Petitioner, Roxanne Tannehill, sued Trinity Universal Insurance Company and others in the Civil District Court for the Parish of Orleans, State of Louisiana, claiming damages for personal injuries sustained in an automobile accident. Trial was held before a jury on January 23, 1968 and by a ten to two verdict Mrs. Tannehill was awarded $5,500.00. Judgment was entered on the verdict in the amount of $5,000.00, the limits of Trinity Universal Insurance Company's policy of insurance. A motion for new trial was denied and Trinity Universal Insurance Company appealed, specifying errors of law and fact.

The Louisiana Court of Appeal, Fourth Circuit, reversed the judgment of the Trial Court, holding that:

> " * * * the jury reached a result herein which is manifestly erroneous . . ." (Tannehill v. Roberts, 216 So. 2d, 656, 659.)

Petitioner, Roxanne Tannehill, applied for a rehearing, which was denied. The Louisiana Supreme Court denied writs of certiorari and petitioner filed her application for writs of certiorari to the Supreme Court of the United States.

ARGUMENT

MAY IT PLEASE THE COURT:

POINT 1

(a) The petitioner's argument is a thinly veiled and untimely indirect attack upon Appellate review of facts and law in Louisiana. When Trinity Universal Insurance Company appealed from the trial judgment to the

Fourth Circuit Court of Appeal of Louisiana, no issue was made by petitioner of the right of the Louisiana Appellate Court to review the facts. It was only after judgment had been rendered by the Court of Appeal that petitioner, in a petition for rehearing, first raised any constitutional issue. Petitioner knew from the moment a petition for appeal was filed by Trinity Universal Insurance Company and certainly after Trinity Universal Insurance Company filed its brief, that the Court of Appeal would be called upon to review facts and law in compliance with Article 7 of the Louisiana Constitution.

Prior to oral argument in the Court of Appeal Roxanne Tannehill, through her attorneys, filed a written brief. But in this brief no constitutional issues whatsoever were raised. The matter was argued orally to the Court of Appeal and no constitutional issue or argument was made. Petitioner did not upon first opportunity timely raise the federal constitutional issues which she now urges. Thus, it was only after the Court of Appeal ruled in this case, and only by means of a perfunctory petition for rehearing that she made for the first time any constitutional argument. It is well settled that:

> "It has been many times held in this Court that an attempt to introduce a Federal question into the record for the first time by a petition for rehearing is too late [citing cases].
>
> "There is an exception to this rule when it appears that the Court below entertained the motion for rehearing, and passed upon the Federal question. But it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general

rule applies [citing cases]." *Forbes v. State Council of Virginia*, 216 U.S. 396, 30 S. Ct. 295, 296, 54 L. Ed. 534. See also *Herndon v. Georgia*, 295 S. Ct. 441, 55 S. Ct. 794, 79 L. Ed. 1530; *Bilby v. Stewart*, 246 U.S. 255, 38 S. Ct. 264, 62 L. Ed. 701. See also 36 C.J.S. Verbo Federal Courts Section 274 (2) pp. 749, 750; Charles Alan Wright, Federal Courts, 1963, West Publishing Company, pp. 424, 425.

(b) Petitioner seems to argue for the right to present evidence in the Louisiana Appellate Court. She says in her petition that in refusing to grant her this right, Louisiana has denied her the due processes of law guaranteed by the United States Constitution and Amendment XIV thereto. However, at no point in the state court proceedings did she make any request or demand for the right to produce evidence in the court of appeal. Only in her petition for writs of certiorari to the Supreme Court of the United States has petitioner contended for the right to produce evidence in the Louisiana Court of Appeal, Fourth Circuit, and it is only in her petition to this court that she contends that a denial of the right to produce evidence is violative of the United States Constitution. She cites no authority for these novel contentions, but in any case, the law is clear that one may not raise a Federal issue, even if this were a Federal issue, for the first time in a petition for certiorari to the United States Supreme Court. *Bailey v. Anderson*, 326 U.S. 203, 90 L. Ed. 3, rehearing denied, 326 U.S. 691, 90 L. Ed. 407; *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 87 L. Ed. 1090.

There are no substantial constitutional issues raised by petitioner's writ application, but even if there were,

by failing to timely raise them below, petitioner has waived any right which she may have had to raise them now.

POINT 2

The record does not support the contention that the Louisiana Appellate Court reviewed facts and reversed facts found by the jury. On the contrary, it simply appears that the Fourth Circuit Court of Appeal held that under the facts in the record the sudden emergency doctrine—a principle of law—is applicable, and the jury verdict was, therefore, erroneous. The Fourth Circuit Court of Appeal said:

> "The whole tenor of the record leads to the inevitable conclusion that Tannehill's actions may not be regarded as negligent in view of the sudden emergency created by the Roberts vehicle. Consequently, we are of the opinion that the jury reached a result which is manifestly erroneous and therefore this aspect of the case will be reversed." *Tannehill v. Roberts*, 216 So. 2d 356, 359.

The jury evidently found that under the facts Tannehill (Trinity Universal Insurance Company's insured) was guilty of negligence. The Appellate Court considered the facts and held as a matter of law that Tannehill was not negligent—that this was a case of sudden emergency. Under the law, since Trinity Universal Insurance Company's insured was not negligent, plaintiff could not recover.

POINT 3

Even were the facts reviewed by the Louisiana Appel-

late Court, and even were it true that the Court of Appeal found facts contrary to those found by the jury, and even if there were some constitutional prescription against or limitation of Appellate Court review of facts found by State Court juries, what the Louisiana Court did is consistent with the practice of Appellate Courts in commonlaw states and in the Federal Courts. The Louisiana Court of Appeal held that the jury verdict was "manifestly erroneous". Even the Federal Courts, which are bound by Amendment VII to the United States Constitution are expected to reverse jury findings when they are clearly or manifestly erroneous. See Federal Rules of Civil Procedure, Rule 52 (a).

POINT 4

Amendment VII to the Constitution of the United States does not apply to the states. Even had the Louisiana Appellate Court reviewed the facts, and even had the jury verdict been something less than clearly or manifestly erroneous, any state is free to modify, regulate or even abolish Civil Jury Trials. Reversal of a jury verdict on facts by a state appellate court does not contravene any applicable provisions of the Federal Constitution. This Court has squarely held that Amendment VII, which guarantees federal jury trials, is not applicable to the states. See *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678. See also *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 49; *Malinski v. New York*, 324 U.S. 401; 65 S. Ct. 781; *Stein v. New York*, 346 U.S. 156, 73 S. Ct. 1077; and see also the numerous cases cited therein.

The states may abolish jury trial altogether. Why then as this Court has so often said, may they not modify the Constitution of or the powers of the jury. As Mr.

Justice Holmes said so well in *Chicago, Rhode Island and Pacific Railroad Company v. Cole*, 251 U.S. 54, 56, 40 S. Ct. 68, 69:

> "There is nothing, however, in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court. It may do away with the jury altogether, *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678; modify its constitution, *Maxwell v. Dow*, 176 U.S. 581, 20 Sup. Ct. 448, 44 L. Ed. 597; the requirements of a verdict, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86 Ann. Cas. 1916E, 505; or the procedure before it, *Twining v. New Jersey*, 211 U.S. 78, 111, 29 Sup. Ct. 14, 53 L. Ed. 97; *Frank v. Mangum*, 237 U.S. 309, 340, 35 Sup. Ct. 582, 59 L. Ed. 969. As it may confer legislative and judicial powers upon a commission not known to the common law, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the States, and the controversy with regard to their powers in matters of law more generally as illustrated in *Spark v. United States*, 156 U.S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, and *Georgia v. Brailsford*, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain

that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed."

POINT 5

The specious argument is made that in reversing the jury verdict, the Louisiana Fourth Circuit of Appeal deprived petitioner of a property right without a hearing and in violation of the "due process" clause of Amendment XIV to the Constitution of the United States. This argument is patently erroneous. At each step of the proceedings petitioner was present and/or represented by the able counsel who filed her petition for a writ of certiorari to the United States Supreme Court. After Trinity Universal Insurance Company's appeal was lodged in the Louisiana Fourth Circuit of Appeal, Trinity Universal Insurance Company filed a brief and served a copy upon petitioner through her lawyers. Her lawyers answered that brief. When the Fourth Circuit Court of Appeal heard argument on the case, petitioner was represented by her lawyers who appeared and vigorously argued the case on her behalf. At no time, as the record clearly shows, were any steps taken in the proceedings without due notice to petitioner. At all times she and/or her lawyers were physically present and took an appropriate part at all proceedings. At no time heretofore has petitioner made any complaint that any action had been taken without notice to her.

Certainly, petitioner paid fees when she filed her lawsuit and demanded a jury trial. All non-indigent litigants in Louisiana pay fees and Court costs in limine. No contention is made, nor has any contention ever been made, that Roxanne Tannehill is indigent. No fees were paid by her under protest.

The whole tenor of petitioner's argument seems to be that having paid required fees she somehow bought a verdict. This verdict, once rendered she contends, regardless of how erroneous it might have been, has become irreversable. Were this a valid argument, the effect would be to deny to the loser in the Trial Court his right of appeal. The answer to petitioner's argument is, of course, that the payment of fees only gives one the right to litigate. It does not purchase verdicts or judgments. Petitioner's case was tried by her very competent lawyers who represented her, and who vigorously advocated her cause. Ultimately she lost her case, but as the record will reflect the Louisiana Courts gave due and proper consideration to every valid issue, timely and properly made.

CONCLUSION

For the reasons stated it is respectfully submitted that this Court should deny petitioner's application for a writ of certiorari.

Respectfully submitted,

James A. Crooks

CERTIFICATE

DISTRICT OF COLUMBIA
CITY OF WASHINGTON

I James A. Crooks, counsel for respondent and a member of the Bar of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing opposition to petition for writs of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid as follows, to-wit:

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Louisiana Court of Appeals
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James A. Crooks

SWORN TO AND SUBSCRIBED BEFORE ME,

this.....day of June, 1969, at the

City of Washington, District of Columbia.

.....

NOTARY PUBLIC